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In the Supreme Court of the United States

OCTOBER TERM, 1978

SOLBORO KNITTING MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 572 F. 2d 936. The decision and order of the National Labor Relations Board (Pet. App. 28a-133a) are reported at 227 NLRB 738.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-27a) was entered on April 25, 1978. The petition

for a writ of certiorari was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that a non-supervisory employee's coercive actions were attributable to petitioner and thus violative of Section 8(a)(1) of the National Labor Relations Act.

2. Whether substantial evidence supports the Board's finding that a bargaining order was the proper remedy for petitioner's violations of Section 8(a)(1) and (3) of the Act.

3. Whether the Board properly found, in the circumstances of this case, that petitioner's refusal to bargain with the Union violated Section 8(a)(5) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3-5.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), on the following facts:

Petitioner is managed by Murray and Rita Harkavy, who are, respectively, its president and secretary-

treasurer (Pet. App. 49a-50a). On or about October 4, 1974, representatives of Local 107, International Ladies' Garment Workers' Union, AFL-CIO (herein, "the Union"), having received authorization cards from nine of petitioner's thirteen employees, approached the Harkavys and requested recognition for the Union as the employees' bargaining agent, offering to present evidence of its majority support. Mr. Harkavy suggested that the Union make a written request. The Union representatives sent a mailgram the same day repeating their request, but never received a reply. (Pet. App. 50a-51a; C.A. App. 81-89, 91, 281-285, 334-335.)[1]

Within minutes after the Union representatives left the plant, Mrs. Harkavy called employee Ana Nemec into her office and interrogated her about the workers' union activities (Pet. App. 51a, 102a; C.A. App. 453-455). Mrs. Harkavy then approached a group of employees; when none responded to her question as to whether they wanted the Union, she said, "I see you girls don't want your jobs" (Pet. App. 52a, 104a; C.A. App. 500-502). That same day, Mr. Harkavy called a meeting of the employees and told them that if they persisted in their desire for Union representation, the plant would be closed (Pet. App. 54a, 105a-106a; C.A. App. 405-406, 531-533, 621-622).

Employee Josephine O'Connell had a "special relationship" with Mrs. Harkavy, and was viewed by

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[1] "C.A. App." refers to the joint appendix to the briefs of the parties in the court of appeals.

the other employees as her spokeswoman; O'Connell relayed instructions from and questions to Mrs. Harkavy, gave out work, and substituted for the Harkavys in their absence (Pet. App. 59a-61a, 108a-109a; C.A. App. 509-514, 716-720, 751-977). The day after the Union's recognition request, O'Connell drafted and signed a letter to the Union withdrawing her authorization and subsequently secured the signatures of three other employees, telling them that she was going to give Mrs. Harkavy a copy.[2] O'Connell also told one of the signers that a raise would be given when work improved, but that no more work would be taken in "until everything is straightened out with the Union," adding that Mrs. Harkavy would "rather close the shop than have the union in." (Pet. App. 61a-66a, 111a-112a; C.A. App. 188, 456-457, 492-499, 508-509, 514-515, 521-522, 735-739, 771-775, 974.)

Following the Union's recognition request on Friday, October 4, petitioner laid off employee Margaret Passannante, although she had been told the day before that she should continue working on Monday (Pet. App. 74a; C.A. App. 346-347, 361). That Monday, October 7, employee Mary White was laid off (Pet. App. 76a-78a; C.A. App. 408, 411, 413). The next morning, employees Grace Rugolo and Donna Moravec, joined by Passannante, White, employee Joyce Brown, and two Union agents, distributed

[2] Mrs. Harkavy subsequently told Nemec that she had done the "right thing" in signing the letter (Pet. App. 9a, 109a; C.A. App. 456-458).

leaflets and Union buttons at the plant driveway. Over Mrs. Harkavy's objection, Rugolo, Moravec, and Brown wore the Union buttons in the shop. Later that day Rugulo and Moravec were laid off. (Pet. App. 70a-71a, 78a-82a; C.A. App. 90, 287-293, 333-338, 367, 419-420, 534-535, 589-593, 657-664.) Mrs. Harkavy engaged in further interrogations of employees on October 9 and 10 (Pet. App. 71a-73a; C.A. App. 623-628, 970).

By the end of November, petitioner's fall season had ended, and the remaining employees were laid off (Pet. App. 86a; C.A. App. 219-235). However, when the next season began the following spring, petitioner refused to recall Rugulo, Moravec, White, and Passannante, although a total of thirteen new employees were hired and it was petitioner's practice to give previous employees the opportunity to return (Pet. App. 88a-102a, 124a-125a; C.A. App. 152-187, 1022, 1030-1040).

2. The Board, affirming the decision of the administrative law judge, concluded that, following the Union's request for recognition, petitioner embarked "upon a course of unfair labor practices designed to destroy the Union's majority status and preclude the holding of a fair election" (Pet. App. 30a). These unfair labor practices included coercive interrogation of employees concerning their and others' Union activities, actual and implied threats of reprisals for their Union support, promises of benefits to employees to enlist their aid against the Union, and circulation of a petition of defection from the Union, all

in violation of Section 8(a)(1) of the Act; and the premature lay-off and subsequent refusal to recall four employees because of their support for the Union in violation of Section 8(a)(3) (Pet. App. 28a-30a).

Moreover, the Board found these "unfair labor practices so extensive and serious as to render impossible or at least unlikely the holding of a fair and free election" (Pet. App. 128a). Therefore, in addition to requiring reinstatement with backpay of those prematurely laid off and the posting of appropriate notices, the Board, noting that at the time the Union requested recognition it possessed valid authorization cards of a clear majority of the unit (*id.* at n. 76), ordered petitioner to bargain with the Union as representative of its employees. In so doing, the Board explained that, even in the absence of the violations of Section 8(a)(3) of the Act, the other unlawful conduct ("particularly" petitioner's owner's speech in which he threatened to close the plant if a union came in) was "sufficient to support a bargaining order in such a small unit where the unfair labor practices need affect very few employees in order to foreclose a fair and free election." (Pet. App. 128a.)

Although the complaint did not in terms allege a violation of Section 8(a)(5), the Board also found that petitioner's behavior following its refusal to bargain with the Union violated Section 8(a)(5) of the Act. That finding was authorized, the Board stated, because the "conduct supportive of [the] 8(a)(5)

finding [was] fully litigated in the course of establishing [the] 8(a)(1) violation" (Pet. App. 29a).[3]

3. The court of appeals enforced the Board's order with modifications not relevant here. (Pet. App. 1a-23a.)[4] The court found that "substantial evidence supports th[e] findings" that petitioner engaged in activity violative of Sections 8(a)(1) and (3) of the Act (Pet. App. 5a). Moreover, the court specifically concluded that substantial evidence supported the Board's conclusion that O'Connell's actions fell within the rule of *National Labor Relations Board* v. *Dayton Motels, Inc.*, 474 F. 2d 328, 331 (C.A. 6), "in which it was held that the acts of non-supervisory employees can be imputed to the employer if the employees in question have close ties with management, as where they 'customarily [deliver] to other employees work instructions from management,' and particularly where the employer acquiesces in the anti-union efforts of the employee-agent" (Pet. App. 9a).

The court also upheld the Board's bargaining order, noting (Pet. App. 16a) that, "[a]s required by [*National Labor Relations Board* v.] *Gissel*, [395 U.S. 575] and by *NLRB* v. *General Stencils, Inc.*, 438 F. 2d 894 (2d Cir. 1971), reasons were given for rec-

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[3] Member Penello and Walther dissented in part, disagreeing with the majority's modification, not relevant here, of the administrative law judge's conclusions regarding the backpay period.

[4] The court modified the Board's order to comport with the views of the administrative law judge and dissenting Board members regarding the backpay period (Pet. App. 18a-23a).

ommending the order in this case: the ALJ found that, even absent the section 8(a)(3) violations, the section 8(a)(1) conduct—particularly Mr. Harkavy's 'speech' to the employees threatening them with the plant closure—was sufficient in this case to support a bargaining order since the unit is small, and unfair practices 'need affect very few employees in order to foreclose a fair and free election.'" The court further stated its view "that the bargaining order can be sustained even without attribution of O'Connell's conduct to the Harkavys" (Pet. App. 9a).

Finally, the court of appeals sustained the Board's ruling that, although no Section 8(a)(5) violation had been alleged, petitioner's refusal to bargain violated that provision since "the complaint *had* alleged [its] failure to recognize and bargain with the union as a violation of section 8(a)(1)" (Pet. App. 16a), noting that "the matter of a proper demand for bargaining was fully litigated" (Pet. App. 17a).

ARGUMENT

1. Petitioner contends (Pet. 18-21) that the court of appeals erred in finding that substantial evidence supported the Board's conclusion that O'Connell's actions were attributable to petitioner. That question raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as shown in the Statement, *supra*, pp. 3-4, there was ample evidence that O'Connell

was accurately viewed as a spokeswoman for management.

There is no merit to petitioner's further contention (Pet. 19-20) that assuming *arguendo* the accuracy of the Board's portrayal of O'Connell's relationship to management, that nexus was insufficient to attribute her actions to petitioner. The cases relied on by petitioner do not support its position. In *National Labor Relations Board* v. *Sayers Printing Co.*, 453 F. 2d 810, 817 (C.A. 8), the court rejected the Board's finding that the two employees in question were supervisors and found no "evidence that would show [they] acted at the request or direction of management." Here, on the other hand, the Board found (Pet. App. 110a) that Mrs. Harkavy actually "fostered" O'Connell's anti-union activity. The Board cases relied on by petitioner are similarly distinguishable.[5] The cited cases create no conflict with the

[5] In *Redwood Construction Co., Inc.*, 192 NLRB 15, 18, the Board found no "probative evidence of * * * [employer] knowledge" of the activities of the employees alleged to be acting in its behalf. In *Western Sample Book and Printing Co.*, 209 NLRB 384, 385, n. 1, the Board rejected the contention that an employee's actions were attributable to his employer, concluding, *inter alia*, that he "was [not] closely allied with management" and the employees were not led to believe he was acting for management. In *Paoli Chair Co., Inc.*, 213 NLRB 909, 910, 918-919, and *Rowand Co., Inc.*, 210 NLRB 95, 96, 115, the imputation of the employee's conduct to the employer was based solely on the allegation that he was a supervisor—an allegation which the Board rejected. And in *Stewart & Stevenson Services, Inc.*, 164 NLRB 741, 742-743, the Board found no evidence that the employer had "authorized or ratified" the conduct in question rejecting the assertion that the employer had "approved or condoned * * * and later sought solace [in]" it.

standard applied by the court of appeals as enunciated in *Dayton Motels, supra*, p. 7.[6]

2. Petitioner further contends (Pet. 12-15) that the decision of the court of appeals upholding the Board's bargaining order conflicts with *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, and cases in the Third, Fourth, Fifth, and Seventh Circuits, in that the Board here did not explain why the unfair labor practices created a situation in which a free and fair election was unlikely. But the fact is that, as the court recognized (Pet. App. 15a-17a), the Board *did* stress the extent of management's unlawful activities and the small size of the unit in concluding that the holding of a fair election was "impossible or at least unlikely" (Pet. App. 128a). Thus, the decisions below were fully consistent with *Gissel*, where this Court ruled (395 U.S. at 614):

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The other cases cited by petitioner are factually distinguishable. In *National Labor Relations Board*

[6] In any event, since the court expressly held the bargaining order to be sustainable without reliance on O'Connell's conduct, the Board's order would stand even if petitioner's arguments on this point were well-founded.

v. *Armcor Industries, Inc.*, 535 F. 2d 239, 245 (C.A. 3), a panel of the Third Circuit remanded the case to the Board to "make 'specific findings' as to the impact of the unfair labor practices on the election process and clearly explicate the basis for its decision to issue a bargaining order." Here, of course, such findings and explication were made. In any event, *Armcor* is not currently law in the Third Circuit, the judgment having been vacated and listed for rehearing *in banc* (see order of Third Circuit dated July 10, 1978, No. 77-1495). In *Shulman's, Inc. of Norfolk* v. *National Labor Relations Board*, 519 F. 2d 498 (C.A. 4), the Fourth Circuit ruled, as a factual matter, that "the result of the assumed violations of the Act * * * was not so permanent or pervasive as to infuse union hostility into a subsequent campaign" (*id.* at 501), particularly where the principal perpetrator of the alleged unfair labor practices had left the company's employ (*id.* at 500). Here, the court of appeals reached a different conclusion on different facts; significantly, in the case at bar, the management group remained unchanged. In *National Labor Relations Board* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (C.A. 5), certiorari denied, 400 U.S. 957, enforcement of a bargaining order was denied by the Fifth Circuit where the Board refused to consider evidence "that a complete turnover in employees and the departure of the only management official involved in the unfair labor practices made a free election possible at that time" (*id.* at 448), and the Board's decision was issued four years after the un-

fair labor practices occurred. Here, in contrast, the record showed that many employees returned year after year (Pet. App. 88a-89a), and, indeed, four of the thirteen were awaiting reinstatement under the Board's order; the perpetrators of the illegal activities remained; and about a year and a half separated the last of the unfair labor practices (refusals in late spring and early summer, 1975, to reinstate those prematurely laid off (Pet. App. 87a-92a)) and the issuance of the Board's order in January, 1977.[7] Finally, the Seventh Circuit cases cited by petitioner —*Peerless of America, Inc.* v. *National Labor Relations Board*, 484 F. 2d 1108, 1120, and *National Labor Relations Board* v. *Gruber's Super Market, Inc.*, 501 F. 2d 697, 701-705—involved "marginal" or "equivocal" violations of Section 8(a)(1) and insufficient Board explanation as to why those alleged violations warranted bargaining orders.

In sum, the Board's bargaining order, enforced by the court of appeals, is plainly proper and consistent

[7] In *National Labor Relations Board* v. *Gibson Products Co.*, 494 F. 2d 762, 766 n. 4 (C.A. 5), the Fifth Circuit explained that the *American Cable* case

> is not an invitation to wholesale experimentation with delay. It does not require a court reviewing a second category bargaining order to reconsider electoral conditions as of the date enforcement is sought. Nor does it authorize the court to remand a case to the Board merely to update the record on appeal to take into account events subsequent to the Board's action.

In *Gibson*, enforcement of a bargaining order was denied where the Board admitted that the unfair labor practices would *not* have an impact on an election (*id.* at 765).

with all relevant precedent. It creates no conflict among the circuits. The case simply involves the question whether substantial evidence supports the Board's order, an issue not appropriate for review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board, supra*, 340 U.S. at 490-491.

3. Finally, there is no merit to petitioner's contention (Pet. 15-18) that since no violation of Section 8(a)(5) was alleged in the complaint, the court of appeals improperly sustained the Board's finding of such a violation. In approving the Board's Section 8(a)(5) finding, the court found that the underlying issues were "fully litigated" (Pet. App. 17a). As the court pointed out, the complaint had alleged a failure to recognize and bargain with the Union as a component of the Section 8(a)(1) violation and therefore "gave full notice of the claim of misconduct" (Pet. App. 17a). The court went on to explain that there was no denial of due process because the complaint informed petitioner " 'of the acts which constitute[d] the charged unlawful behavior and [petitioner was] given an opportunity to respond,' " citing *National Labor Relations Board* v. *Scenic Sportswear*, 475 F. 2d 1226, 1227 (C.A. 6) (Pet. App. 17a).[8]

Contrary to petitioner's assertion, the Eighth Circuit's decision in *Drug Package, Inc.* v. *National Labor Relations Board*, 570 F. 2d 1340, does not con-

[8] Indeed, the administrative law judge specifically rejected arguments made by petitioner "concerning (1) the sufficiency of the authorization cards * * * and (2) the adequacy of the bargaining demand * * *" (Pet. App. 128a, n. 76).

flict with the instant case. There, the court "recognized the Board's power to decide an issue that has been fairly and fully tried by the parties, despite the fact that the issue was not specifically pleaded" (*id.* at 1345). The court simply found that on the facts of that case the principle should not be applied because there the additional finding of a Section 8(a)(5) violation meant that striking employees would be entitled to reinstatement and backpay to which they would not otherwise have a right (*ibid.*). In the case at bar, on the other hand, no additional remedies flowed from the Section 8(a)(5) finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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